

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned On Briefs June 24, 2009

WILLIAM JEFFREY WALKER v. NISSAN NORTH AMERICA, INC.

Direct Appeal from the Circuit Court for Rutherford County
No. 51909 Royce Taylor, Judge

No. M2009-00273-COA-R3-CV - Filed August 21, 2009

This appeal involves the dismissal of a personal injury case arising from an accident that occurred at Defendant's automobile manufacturing plant. The suit was originally filed and then voluntarily dismissed for improper venue. The case was filed again and later dismissed for failure to prosecute. Plaintiff filed a Motion to Set Aside the Order of Dismissal which was denied by the trial court. Plaintiff appeals. Finding that the trial judge did not abuse his discretion, we affirm the judgment of the trial court.

Tenn. R. App. P. 3. Appeal as of Right; Judgment of the Circuit Court Affirmed

J. STEVEN STAFFORD, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

Lawrence D. Sands, Columbia, Tennessee, for the Appellant, William Jeffrey Walker.

Steven D. Parman, Nashville, Tennessee, for the Appellee, Nissan North America, Inc.

OPINION

Appellant William Jeffrey Walker ("Mr. Walker") was injured while working at Nissan North America, Inc. ("Nissan") in Smyrna, Rutherford County, Tennessee. Plaintiff was an employee of Atlas Industrial Contractors ("Atlas"). Atlas contracted with Nissan to perform work inside the plant. Under the contract, Nissan supplied Atlas with an overhead crane to complete its work. On December 17, 2003, Mr. Walker was working with the crane's operator at the Nissan facility. While moving the crane, the operator unsuccessfully tried to stop the movement of the crane. Mr. Walker attempted to dodge the crane as it approached but he lost his balance and fell. Unfortunately, the crane then struck Mr. Walker and crushed both of his legs.

Mr. Walker initially filed suit against Nissan on December 15, 2004, in the Maury County Circuit Court. The suit was voluntarily dismissed by Mr. Walker after Nissan filed a motion to

dismiss for improper venue. The suit was then filed in the Rutherford County Circuit Court on May 31, 2005. On August 24, 2007, the court entered a Show Cause Order requiring the parties to either dispose of the case or set it for final hearing at least five days prior to November 9, 2007. The order further stated that if neither of these actions were taken, the parties must appear for a hearing on November 9, 2007 and show cause why the case should not be dismissed. Neither Mr. Walker nor his counsel appeared, and on November 16, 2007, the court entered an order dismissing the matter without prejudice for failure to prosecute.

On November 14, 2008, Mr. Walker's current counsel, Lawrence D. Sands,¹ filed a Motion to Set Aside the Order of Dismissal. In this motion, Mr. Walker stated that he had no knowledge of the pending dismissal until he received notice from his former counsel on November 29, 2007. Nissan filed its response to Mr. Walker's motion on December 17, 2008. On December 18, 2008, Mr. Walker filed an amended motion asking the trial court to set aside the order of dismissal pursuant to Tennessee Rule of Civil Procedure 60.02(1). The amended motion included the affidavit of Mr. Sands. After hearing oral argument, the trial court issued a memorandum stating that Mr. Walker failed to establish the grounds for relief required under Rule 60.02(1). The trial court also found that the motion was not filed within a "reasonable time" because Mr. Walker had actual knowledge of the order of dismissal as early as thirteen days after its execution but waited nearly a full year before filing his Rule 60.02(1) motion. The trial court entered its final order denying Mr. Walker's motion on January 21, 2009. Mr. Walker appeals and raises one issue for review: whether the trial court erred in denying his Motion to Set Aside Order of Dismissal.

Law and Analysis

We review a trial court's decision to grant or deny relief pursuant to Rule 60.02 under the abuse of discretion standard of review. *Henry v. Goins*, 104 S.W.3d 475, 479 (Tenn. 2003). Under this standard, a trial court's ruling "will be upheld so long as reasonable minds can disagree as to propriety of the decision made." *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001). A trial court abuses its discretion only when it "applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining." *Id.* Under the abuse of discretion standard, the appellate court may not substitute its judgment for that of the trial court. *Id.* Furthermore, our Supreme Court emphasizes that great deference is given to the trial court when reviewing its decision to grant or deny relief pursuant to Rule 60.02. *Henry*, 104 S.W.3d at 479.

Under Rule 60.02(1), the court may relieve a party or the party's legal representative from a final judgment, order or proceeding for mistake, inadvertence, surprise or excusable neglect. Tenn. R. Civ. P. 60.02(1). The motion for relief under Rule 60.02(1) must be made within a reasonable time but not more than one year after the judgment, order or proceeding was entered. *Id.*

¹ According to his affidavit, Mr. Sands began representing Mr. Walker on March 30, 2007 but did not represent him in the present action until the filing of the motion to set aside the order of dismissal.

In the present case, the trial court first found that Mr. Walker's motion was not filed within a reasonable time. The motion was filed on November 14, 2008, two days prior to the one-year limitation imposed by Rule 60.02. The trial court found this unreasonable because Mr. Walker learned of the dismissal on November 29, 2007 but waited nearly a year before filing his motion. A Rule 60.02(1) motion filed within the one-year limitation may be considered untimely "if the trial court finds, as a matter of fact, that the movant has not acted reasonably and that he could have fairly and reasonably been expected to file the motion much more promptly." *Wooley v. Gould, Inc.*, 654 S.W.2d 669, 670 (Tenn. 1983), *rev'd on other grounds*, *Betts v. Tom Wade Gin*, 810 S.W.2d 140 (Tenn. 1991). Whether a Rule 60.02(1) motion is filed within a reasonable time is a question of fact for the trial court, and this Court will review the trial court's determination under the abuse of discretion standard. *Rogers v. Estate of Russell*, 50 S.W.3d 441, 445 (Tenn. Ct. App. 2001).

Mr. Walker concedes that he was made aware of the trial court's order of dismissal by notification from his previous counsel on November 29, 2007. Mr. Walker's current counsel, however, asserts that he did not know that the action had been previously filed and dismissed in the Maury County Circuit Court until November 13, 2008. Before he learned of this previous dismissal, current counsel intended to re-file the action pursuant to the savings statute, Tenn. Code Ann. § 28-1-105. This option became unavailable because the action had been dismissed on two separate occasions. Mr. Walker contends that he would have filed his Rule 60.02(1) motion earlier had he known that the savings statute was inapplicable. In his affidavit, Mr. Walker's attorney also notes that he filed the Rule 60.02(1) motion only a day after he learned of the first dismissal. Having reviewed the record in this case, we decline to address the trial court's finding on the timeliness of the motion because its ruling can be upheld on a separate ground.

Assuming that Mr. Walker's motion was timely filed, the trial court also found that he failed to establish the grounds for relief under Rule 60.02(1). To obtain relief under Rule 60.02(1), "a party must present properly supported facts explaining why he or she was justified in failing to avoid mistake, inadvertence, surprise or neglect." *Dockery v. State*, No. M2006-00014-COA-R3-CV, 2007 WL 2198195, at *3 (Tenn. Ct. App. July 23, 2007). The trial court should then consider both these facts and the type of the underlying judgment or order from which the party seeks relief. *Id.* The second step is critical because Rule 60.02 is "construed with liberality to afford relief from a default judgment." *Tenn. Dep't of Human Servs. v. Barbee*, 689 S.W.2d 863, 867 (Tenn. 1985). Similar liberality is also applied when the party seeks Rule 60.02(1) relief from a dismissal for failure to prosecute. *Henry*, 104 S.W.3d at 481.

In the present case, Mr. Walker only presented the affidavit of his current attorney, Mr. Sands, in support of his Rule 60.02(1) motion. This affidavit does not disclose why Mr. Walker failed to appear at the show cause hearing on November 9, 2007. The failure to appear may have been caused by the excusable neglect or mistake of Mr. Walker's previous attorney, but Mr. Walker failed to present any evidence on this issue. Mr. Walker asserts that lack of notice of the initial hearing date constitutes excusable neglect under Rule 60.02(1), but he failed to present any evidence supporting this assertion to the trial court. Even under the more lenient standards applied to Rule 60.02(1) motions seeking relief from dismissals, the moving party must offer proof of the basis upon

which relief is sought. *Henry*, 104 S.W.3d at 482. Mr. Walker failed to do so. Consequently, we find that the trial court did not abuse its discretion in refusing to grant Mr. Walker relief under Rule 60.02(1).

For the foregoing reasons, the ruling of the trial court is affirmed. Costs of appeal are assessed to Appellant, William Jeffrey Walker.

J. STEVEN STAFFORD, J.